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No. 88-947

In the Supreme Court of the United States

OCTOBER TERM, 1988

THOMAS C. HARRISON AND RITA HARRISON, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

WILLIAM C. BRYSON
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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Petitioners contend that the courts below erred in denying their request for attorneys' fees under Section 7430 of the Internal Revenue Code.[1]

1. During 1980, petitioner Thomas Harrison was a limited partner in Triangle Village Associates, Ltd. (Triangle), a New Jersey limited partnership. On their 1980 joint federal income tax return, petitioners reported a net loss in the amount of $47,278, representing Thomas Harrison's distributive share of the loss claimed by the partnership. Petitioners also claimed an investment tax credit from Triangle in the amount of $35. Pet. App. A2.

The Internal Revenue Service (IRS) conducted an examination of Triangle's partnership tax returns for the calendar years 1979, 1980, and 1981. The IRS informed

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[1] Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.), as amended (the Code or I.R.C.).

petitioners that it was auditing Triangle's 1980 tax return, and that, consequently, petitioners' income tax return for 1980 was also under examination. The statute of limitations for assessment of tax liability for 1980 was scheduled to expire on April 15, 1984, but it became apparent that the IRS would not complete its audit of Triangle's partnership returns by that date.[2] Accordingly, on April 2, 1984, the IRS sent to petitioners a form containing a consent to an extension of the statute of limitations for their 1980 tax liability and requested that they promptly execute the consent. On April 4, 1984, petitioners executed and mailed the consent to the IRS, but the IRS never received the document. Faced with the imminent expiration of the statute of limitations, the IRS issued a notice of deficiency to petitioners on April 11, 1984, asserting that petitioners owed an additional $25,347 in tax for the year 1980 because the IRS was disallowing the investment tax credit and the loss deduction claimed from Triangle's activities. Pet. App. A2-A3.

On June 6, 1984, petitioners timely filed a petition in the Tax Court seeking relief from the deficiency determined for 1980. The IRS filed an answer generally denying petitioners' allegations. On November 28, 1984, the IRS concluded the audit of Triangle's partnership returns. It issued a "no-change" letter for the calendar year 1980, which indicated that the return for that year was accepted as filed and that no deficiency was found. Pet. App. A3.

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[2] Congress has attempted to address this problem by prescribing special procedural requirements for examination of partnership returns. See I.R.C. §§ 6221-6233. These special procedures, however, are applicable only for partnership taxable years commencing after September 3, 1982, and hence did not apply in this case. See Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, § 407(a)(1), (3), 96 Stat. 670-671 (1982).

On December 17, 1984, petitioners' attorney contacted the IRS's counsel to advise him of the "no change" determination made with respect to Triangle. This communication was the first between the parties since the notice of deficiency was issued. The IRS's District Counsel thereupon agreed to concede the case against petitioners, subject to verification. During this conversation, counsel agreed to report the case as a "probable settlement" on the Tax Court's trial status report. During the following month, the IRS's counsel verified the status of Triangle's audit. The parties then filed a stipulation with the Tax Court in which the IRS conceded the deficiency in full. Pet. App. A3.

2. Petitioners thereafter moved for an award of attorneys' fees and costs under Section 7430 of the Code. Petitioners contended that the administrative conduct of the IRS in issuing the notice of deficiency solely to avoid the imminent expiration of the statute of limitations was unreasonable. The Tax Court denied the motion (Pet. App. B1-B14). The court explained that under the pre-1986 version of Section 7430 applicable to this case, the relevant inquiry is into "the reasonableness of [the IRS's] position *during the litigation*, that is to say, from the time of the filing of the petition in this Court" (Pet. App. B9 (emphasis in original)). Because the IRS promptly conceded the case after learning of the no-change letter, the court found that its litigating position was reasonable (*id.* at B11-B14). The court also stated that, even if petitioners were correct that the IRS's administrative position was relevant, "we do not find the issuance of the notice of deficiency unreasonable" (*id.* at B10 n.5).

The court of appeals affirmed (Pet. App. A1-A9). The court acknowledged that the courts of appeals have disagreed on whether the reasonableness inquiry under

pre-1986 Section 7430 extends to the IRS's administrative position or instead is limited to the IRS's litigating position in court, as the Tax Court held (*id.* at A5 n.3). The Seventh Circuit found it unnecessary to reach that issue, however, because it determined that both the IRS's litigating and administrative positions were reasonable (*id.* at A5-A8 & n.3). The court concluded that "the government acted reasonably in attempting to preserve its right to conduct a full investigation before making a final determination on whether it should allow [petitioner's] deductions" (*id.* at A7-A8).

3. Petitioners argue that they are entitled to attorneys' fees because the IRS acted unreasonably is issuing the notice of deficiency. They contend that certiorari is warranted here to resolve a conflict in the circuits concerning whether the term "position of the United States" in the pre-1986 version of Section 7430 extends to the IRS's administrative position. This contention is plainly without merit. First, the issue is not even presented because, as both courts below found, both the IRS's administrative position and its litigating positions were reasonable in this case. Moreover, the conflict asserted by petitioners is of little continuing importance because Congress amended Section 7430 to resolve the conflict for cases commenced after December 31, 1985. Indeed, this Court recently denied certiorari in a case where, unlike here, the court of appeals actually addressed the question of the correct interpretation of the pre-1986 version of Section 7430. *Saul* v. *United States*, No. 87-1676 (June 30, 1988). There is no more reason for the Court to grant review here than there was in *Saul*.

a. As we noted in our brief in *Saul*, petitioners are correct in stating (Pet. 19-28) that there exists a conflict among the circuits in interpreting Section 7430(c)(2)(A)(i) of the Code, as applicable to cases commenced before

December 31, 1985—specifically, whether the claimant can "establish[] that the position of the United States in the civil proceeding was unreasonable" by reference to the IRS's administrative position as well as to its litigating position. This conflict was resolved by Congress, however, in Section 1551(e) of the Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2753, which amended Section 7430 of the Code to provide an express definition of the phrase "position of the United States" that includes specified administrative actions by the IRS.[3] That definition was made applicable to cases commenced after December 31, 1985 (§ 1551(h), 100 Stat. 2753). Subsequently, Congress again amended Section 7430 to define the "position of the United States" by specifying different administrative actions of the IRS that are to be covered, effective for proceedings commenced after November 10, 1988. Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, § 6239, 102 Stat. 3745-3746.[4] Thus, the question

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[3] After the 1986 amendment, Section 7430(c)(4) provided as follows:

> **Position of United States**—The term "position of the United States" includes—
>
> (A) the position taken by the United States in the civil proceeding, and
>
> (B) any administrative action or inaction by the District Counsel of the Internal Revenue Service (and all subsequent administrative action or inaction) upon which such proceeding is based.

[4] Section 7430(c)(7) of the Code, as amended in 1988, now provides:

> **Position of United States**—The term "position of the United States" means—
>
> (A) the position taken by the United States in the judicial proceeding to which subsection (a) applies, and

presented in this case concerns a statute that is relevant only to a dwindling number of cases commenced prior to 1986, and there is no reason for this Court to consider it.[5]

b. In any event, the court of appeals correctly held that the question presented by petitioners to this Court need not be resolved in this case because both the litigating and the administrative positions of the IRS were reasonable. When the IRS did not receive a copy of petitioners' consent to extend the statute of limitations to permit completion of the partnership audit, it was faced with the choice of issuing a protective notice of deficiency or forever forgoing the ability to assess a deficiency in petitioners' 1980 tax liability. It was reasonable for the IRS to seek to preserve its ability to conduct a full investigation before making a final determination on whether it should allow the deduction and credit claimed by petitioners through their partnership. Indeed, the Tax Court has specifically recognized the reasonableness of issuing a protective notice of deficiency when the statute of limitations is about to expire. *Wasie* v. *Commissioner*, 86 T.C. 962, 969 (1986); *Chaum* v. *Commissioner*, 69 T.C. 156,

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(B) the position taken in an administrative proceeding to which subsection (a) applies as of the earlier of—

(i) the date of the receipt by the taxpayer of the notice of the decision of the Internal Revenue Service Office of Appeals, or

(ii) the date of the notice of deficiency.

[5] Petitioners assert (Pet. 31-33) that the 1988 version of Section 7430 is ambiguous and therefore suggest that the Court should grant certiorari here lest the "statute * * * continue to be mired in uncertainty" (Pet. 33). Whether or not petitioners' speculation about the clarity of the recent amendment proves to be accurate, this case does not involve the present version of Section 7430 and provides no occasion to construe it.

160-164 (1977); see also *Luhring* v. *Glotzbach*, 304 F. 2d 560, 565 (4th Cir. 1962).[6]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WILLIAM C. BRYSON
Acting Solicitor General

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[6] Contrary to petitioners' contention (Pet. 24-25), *Weiss* v. *Commissioner*, 850 F.2d 111 (2d Cir. 1988), and *Powell* v. *Commissioner*, 91 T.C. No. 43 (Sept. 26, 1988), do not cast any doubt on the correctness of these decisions. Neither of those cases involved a protective notice of deficiency issued to prevent the expiration of the statute of limitations on assessments pending completion of an audit.

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